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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ----------

G. T. BLANKENSHIP, Attorney General; State of Oklahoma; SUN OIL COMPANY (formerly SUNRAY DX OIL COMPANY), a foreign corporation; KERR-McGEE CORPORATION; PHILLIPS PETROLEUM COMPANY; BAXTER LAND CORPORATION (formerly INLAND ASPHALT, INC.),

Petitioners,

VERSUS

STATE OF OKLAHOMA, EX REL. J. WOODROW WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1971

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In the
Supreme Court of the United States

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No. ----------

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Petitioners,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, G. T. Blankenship, Attorney General, State of Oklahoma, Sun Oil Company (formerly Sunray DX Oil Company), Kerr-McGee Corporation, Phillips Petroleum Company, and Baxter Land Corporation (formerly Inland Asphalt, Inc.), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 24, 1971.

OPINIONS BELOW

The opinion of the district court is reported in 308 F.Supp. 870, and that of the Court of Appeals in 447 F.2d 687. Both are printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 24, 1971. A timely petition for rehearing *en banc* was denied on October 7, 1971, and this petition for certiorari was filed within 90 days from August 24, 1971. The judgment of the Court of Appeals and its order denying petition for rehearing appear in the Appendix. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether an action filed in a state court in which the petition shows on its face that nullification of a final judgment of a United States District Court in a treble damage action is an essential and absolute prerequisite to the granting of the relief sought is removable under 28 U.S.C. Sec. 1441.

STATUTORY PROVISIONS INVOLVED

The statutes involved are:

Title 28 U.S.C. Section 1441 (a) and (b), 62 Stat. 937.

Title 28 U.S.C. Section 1355, 62 Stat. 934.

Title 28 U.S.C. Section 1337, 62 Stat. 931.

Oklahoma Statutes 1961, Vol. 2, Title 62, Sections 372 and 373 (Pages 827 and 828).

Because of their length, the statutes referred to are set out verbatim in the Appendix.

STATEMENT OF THE CASE

This case arose out of and is closely related to an action instituted in the United States District Court for the Western District of Oklahoma by the State of Oklahoma, *ex rel.* Charles Nesbitt, Attorney General. All of the petitioners with the exception of G. T. Blankenship, who succeeded Nesbitt, were defendants. The complaint alleged a violation of the Antitrust Laws of the United States, and sought the recovery of treble damages. The case was tried, a verdict for plaintiff was rendered, and actual damages found to be $1,548,371.31. A hearing was held on the question of attorneys' fees, which the court fixed at $285,000.00. Judgment was entered on September 24, 1968, in favor of the State for the amount of the verdict, after trebling, plus attorneys' fees.

The defendants filed motions for judgment notwithstanding the verdict and for a new trial. One of the grounds was that the verdict was excessive. While these motions were pending, a compromise was agreed upon under the provisions of which the court would, if it approved the proposal, find the verdict excessive and order a remittitur of all in excess of $2,500,000.00 plus attorneys' fees. The court approved the proposal, and on January 15, 1969, a formal order embodying the terms of the compromise was presented and signed by the court. Basically, it included a finding that the verdict was excessive by the sum of $704,021.31, and provided that if the State filed a remittitur of all in excess of $2,500,000.00 plus attorneys' fees, the former judgment would be modified and reentered for the unremitted amount plus attorneys' fees;

otherwise the court would retain jurisdiction to act upon the motions pending.

The State promptly filed a remittitur, the final judgment (January 15, 1969) was paid and a satisfaction thereof filed.

The present action was filed in the state court. The relator relies for his authority to do so on Okla. Stat. 1961, Vol. 2, Title 62, Sections 372 and 373. The petition recited and alleged with particularity what transpired in the federal court, and supported such allegations by the attachment to the petition of copies of the proceedings and orders of the court by which the compromise was consummated. It also alleged that the filing of the remittitur and acceptance of the reduced judgment by the Attorney General were unauthorized. Plaintiff sought the recovery of interest on the court's judgment of September 24, 1968 to January 15, 1969, the difference between the amount originally awarded and $2,500,000.00, with interest thereon from January 15, 1969, and the sum of $285,000.00 attorneys' fees paid on January 15, 1969, with interest thereon until paid, which amounts plaintiff says should be doubled under the provisions of the Oklahoma statutes hereinabove referred to.

The defendants removed the case to the United States District Court for the Western District of Oklahoma, which overruled a motion to remand and decided the case on the merits favorably to the defendants.

On appeal the Court of Appeals reversed, holding that the cause was not removable.

The jurisdiction of the district court rested upon Title 28 U.S.C., Sec. 1441 (a) and (b), *supra*.

REASONS FOR GRANTING THE WRIT

The principal reasons for allowance of the writ are as follows:

1. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.
2. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.
3. THE DECISION OF THE COURT OF APPEALS OVERLOOKS OR DISREGARDS THE PROVISIONS OF TITLE 28 U.S.C., SEC. 1355.
4. THE COURT OF APPEALS, HAVING DETERMINED THAT THE CASE WAS IMPROPERLY REMOVED, BY DEVOTING A SUBSTANTIAL PORTION OF ITS OPINION TO THE DISCUSSION OF AN UNNECESSARY POINT, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1.

THE IMPORTANCE OF THE QUESTION.

The importance of determining whether a state court may tamper with and nullify a final decision of a federal court can hardly be denied.

Respondent concedes, as indeed it must, that whether the agreement to compromise was valid or not, it was embodied in a solemn judgment of a federal court. The validity and binding effect of the judgment, as distinguished

from the agreement, must be determined by a court of competent jurisdiction. The present attack comes too late and is made in the wrong court.

In *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936), a case heavily relied upon by respondent and by the Court of Appeals, the question of removability of an action brought in a state court to recover taxes allegedly due from the bank under state law was presented. There was in existence at the time a federal statute (12 U.S.C. Sec. 548), wholly permissive in character. The cause was removed, a motion to remand was denied, and after a trial on the merits, plaintiff there sought review, which was granted. The opinion recites "Because of the importance of the ruling this court granted certiorari 'limited to the question of jurisdiction of the district court.'"

Obviously the factual situation in *Gully* bears not the slightest resemblance to the one here. The importance of the question here looms larger because respondent indirectly and collaterally seeks to nullify a solemn, final, satisfied judgment of a United States District Court.

It is true that in the state court petition the respondent did not in specific words pray for the vacation or nullification of the judgment. This is unimportant, for as Judge Murrah pointed out in *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F.2d 767 (Tenth Circuit, 1963):

> "A genuine and substantial Federal Question must be stated, and the Court will look beyond the naked allegations of the complaint, to determine whether the asserted claim is controlled or conditioned by Federal law. See: Polhemus v. American Medical Ass'n., 10 Cir., 145 F. 2d 357."

An examination of the petition and attachments will disclose beyond doubt that before any relief by way of damage could be obtained, respondent in some way had to get rid of the final federal court judgment. All doubt in this regard was removed when respondent filed an amended complaint in the removed case in which it alleged:

> "In this connection, plaintiff states that defendants could not achieve indirectly through an agreed order what they could not lawfully do directly, by reason of which the order of judgment of January 15, 1969, was unauthorized and is therefore void, a nullity insofar as it purports to modify the September 24, 1968 judgment."

Likewise, the prayer was changed so as to read:

> "WHEREFORE, premises considered, plaintiff prays judgment against the defendants in behalf of the State of Oklahoma *holding the order of January 15*, 1969 void insofar as it purports to modify the September 24, 1969 (sic) judgment * * *." (Emphasis supplied.)

Thus respondent boldly directs an attack upon the federal judgment. Whether the action constitutes a direct, indirect, or collateral attack, it must be accomplished, if at all, by resort to the Federal Rules of Civil Procedure, which specify and outline the causes for and method of obtaining relief from a judgment of the federal court (Rule 60b).

This and other rules, if they are to have any vitality, must provide the exclusive method of obtaining such relief.

In *Gully*, Mr. Justice Cardozo rather tersely observed that in order to bring a case within federal jurisdiction, it must assert "a right or immunity created by * * * laws of the United States * * *." The case here clearly meets this requirement. To say otherwise is to ignore realities and disregard the common sense approach which Mr. Justice Cardozo advocated in *Gully* when he said:

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67, 68, 53 S. Ct. 278, 280, 77 L. Ed. 619. To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end."

This, of course, does not mean that every case in which a federal law or statute is involved is automatically removable. However, after giving full recognition to this wholesome rule, the author in Moore's Federal Practice, Paragraph 6038 (1), pages 638-639, expresses the corollary in the following language:

> "But an action to enjoin or otherwise obtain relief from a federal judgment involves the validity of the judgment as a continuing obligation; the substantive principles of the action are federal; and, we believe, presents a general federal question."

Cases cited in support of the statement are:

—*South Dakota Cent. Ry. Co.* v. *Continental & Commercial Trust & Savings Bank* (C.C.A. 8th, 1919), 255 Fed. 941, *cert. den.* (1919) 250 U.S. 642, 39 S.Ct. 493, 63 L.Ed. 1186;

Deauville Associates v. *Lojoy Corp.* (C.A. 5th, 1950), 181 F.2d 5, cert. den. (1950) 340 U.S. 905, 71 S.Ct. 281, 95 L.Ed. 655;

Cornue v. *Ingersoll* (C.C.D. Mass. 1909), 174 Fed. 666, *aff'd* (C.C.A. 1st, 1910) 176 Fed. 194.

Furthermore, the action here is, as the district court found and the Court of Appeals recognizes, ancillary to the main action, and therefore clearly within the jurisdiction of that court.

The importance of the question, which should be settled by this Court, becomes readily apparent when recognition is accorded to several subsidiary questions which will remain unanswered if the writ be denied. A few of these are:

1. If the final judgment of the federal court be vacated, what is the posture of the basic case in that court?

2. Does the federal case revert to its status prior to the vacation of the final judgment? If the answer to this question is "yes," the district judge could sustain the defendants' motions for judgment or grant a new trial.

3. If the district court overrules both motions, is the right of defendants to appeal to the Court of Appeals preserved?

Needless to say denial of the writ will leave the principal and subsidiary questions unanswered. Only if the writ be granted and the cause reversed will all of them be settled.

2.
THE CONFLICT AMONG COURTS.

Cases having to do with the removability of state court actions involving federal court judgments are understandably few. Numerous district court decisions, when an attack upon the title to property which vested as the result of federal court proceedings has been made, have held such actions to be removable. So has the Fifth Circuit in *Deauville Associates, Inc.* v. *Lojoy Corp., et al.*, 181 F.2d 5 (Fifth Circuit, 1950). That Court, in the first paragraph of the opinion, describes the action as follows:

> "The suit attacks a title to property acquired under and resting on an order in cause No. 1148-M-Civil in the United States District Court for the Southern District of Florida, and has for its object the nullifying of that order.
>
> * * * * * *
>
> "On April 21, it was removed to the federal court on the ground that the suit was one arising out of an attack upon the validity of an order of sale issued out of the United States District Court for the Southern District of Florida, in No. 1148-M-Civil, and, therefore, was a civil action founded on a claim or right arising under the laws of the United States."

In rejecting the contention made by the plaintiff "that its suit was not based upon a federal question and there-

fore it should have been remanded," the Court, in referring to this and another contention, said:

> "We cannot agree with either of these contentions. It is quite clear, upon the authorities, that the suit was founded upon, and raised, a federal question authorizing its removal to the federal court."

The same thing is true as regards the decision of the Eighth Circuit in *South Dakota Cent. Ry. Co.* v. *Continental & Commercial Trust & Savings Bank, et al.*, 255 Fed. 941. As the opinion points out:

> "The cause was originally instituted by the appellant in a circuit court of the state of South Dakota, and on petition of the appellees removed to the District Court of the United States for the District of South Dakota. A motion to remand the cause to the state court was overruled, and thereupon the motion to dismiss the complaint for failing to state a cause of action was sustained."

The object of the complaint was to redeem certain railroad property, the title to which had passed by virtue of a sale by a special master, whose report was filed and approved. In the state court action, the plaintiff contended that under the statutes of South Dakota the property could not be sold without valuation, appraisement and the right of redemption, and that the decree, having failed to so provide, was void and subject to collateral attack at any time.

The first question considered by the Court of Appeals was whether the district court erred in refusing to remand the case to the state court. In holding that it did not, the Court stated:

"As this is an action attacking a title to property acquired under a decree of a national court, upon the ground that the decree was coram non judice, there is a federal question involved, the action being dependent upon the original proceeding, under which title is claimed, and it was clearly removable upon that ground. This has been decided by the Supreme Court and this court, as well as all other national courts, so many times, that it has ceased to be a debatable question. Among the many decisions, upholding the jurisdiction of the national courts on this ground, decided by this court, are the following: Campbell v. Golden Cycle Mining Co., 141 Fed. 610, 73 C.C.A. 260; Lang v. Choctaw, Oklahoma & Gulf R. R., 160 Fed. 355, 87 C.C.A. 307; Mound City v. Castleman, 187 Fed. 921, 110 C.C.A. 55; Ferguson v. Omaha, etc., R. R. Co., 227 Fed. 513, 142 C.C.A. 145; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 156 C.C.A. 448."

According to the official report, certiorari was denied, *249 U.S. 643, 39 Sup.Ct. 493.

If an attack upon the title to land which has been the subject matter of a federal court decree raises a federal question, surely one which levels an attack upon a final, satisfied judgment, by reason of which more than $2,500,000.00 has changed hands, does the same thing. Not only does the action attack the federal judgment of January 15, 1969, it relies upon the earlier modified federal judgment of September 24, 1968, as the basis for recovery.

The conflict between the opinion here and those of the Fifth and Eighth Circuits should be resolved.

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* The correct volume number is 250.

3.

THE OPERATION AND EFFECT OF SECTION 1355.

As the Court of Appeals pointed out in its opinion:

> "*Second*, it is true that the Oklahoma state case bears a considerable relationship to the prior federal case. As was true in Cuba, this present action would not have arisen had there not been a federal case and a federal judgment."

As a matter of fact, respondent seeks to fix its alleged damages by mathematically computing the differential between the amount paid to satisfy and discharge the remitted final judgment and the verdict trebled, plus interest and attorneys' fees of $285,000.00, notwithstanding respondent's contention that the modified and re-entered final judgment is void and of no effect. In so doing, respondent ignores or overlooks the fact that if the final judgment be nullified, there would be no disposition of the motions for judgment notwithstanding the verdict and for new trial, which were overruled therein.

Furthermore, since the jury fixed respondent's actual damage at $1,548,371.31, the payment of $2,500,000.00 included all actual damages plus a portion of the penalty resulting from the trebling requirement. Thus the recovery here sought can only be of a portion of the penalty imposed by law.

Congress has been very careful to confine to the federal courts all questions relating to or arising out of the Antitrust Laws. Furthermore, by the enactment of Section 1355, it has vested the district courts of the United States with "original jurisdiction exclusive of the courts of the

states of any action or proceeding for the recovery or enforcement of any fine, penalty or forfeiture, pecuniary or otherwise, incurred under any Act of Congress."

The fact that respondent seeks recovery of a portion of the penalty contained in the interim judgment of the district court by devious and indirect means does not overshadow the true nature of its claim. Jurisdiction of such an action lies exclusively in the district courts, and for this additional reason the cause was removable.

4.
THE DEPARTURE OF THE COURT FROM ACCEPTED PROCEDURE.

The opinion recites, "The fact is that we have before us a removal question. Injunctive relief under Section 2283, *supra*, was not demanded or considered in the district court." Notwithstanding this, the author of the opinion, after having concluded that the case was improperly removed, enters upon a lengthy discussion having to do with the availability of injunctive relief to protect the integrity of the judgment of the district court. The point was not briefed or argued. It was merely mentioned as demonstrating that by removal the case got where it ought to be, that is, in the court which rendered the judgment under attack. The discussion and perhaps conclusion that injunctive relief is not available is purely gratuitous. This Court should, in the exercise of its supervisory powers, correct this harmful error.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted

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November, 1971

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
Oct. 31, 1969
REX B. HAWKS
Clerk, U. S. District Court
By LADANA SMITH
Deputy

STATE OF OKLAHOMA ex rel J. WOODROW WILSON, Plaintiff, vs. G. T. BLANKENSHIP, ATTORNEY GENERAL, STATE OF OKLAHOMA, SUN OIL COMPANY (formerly Sunray DX Oil Company) a foreign corporation, KERR-McGEE CORPORATION, PHILLIPS PETROLEUM COMPANY, RIFFE PETROLEUM COMPANY, BAXTER LAND CORPORATION (formerly Inland Asphalt, Inc.), Defendants.	)	No. 69-73 Civ.

Paul W. Brightmire, Tulsa, Oklahoma, Attorney for Plaintiff.

Dale Cook and J. A. O'Toole, Oklahoma City, Oklahoma, Attorneys for Defendant, G. T. Blankenship, Attorney General; Truman Rucker, J. P. Greve and John A. Ladner, Jr., Tulsa, Oklahoma, Attorneys for Sun Oil Company; Coleman Hayes, Oklahoma City, Oklahoma, Attorney for Kerr-McGee Corporation; R. B. McDermott, Tulsa, Oklahoma, S. E. Floren, Bartlesville, Oklahoma, and Edward J. Fauss, Oklahoma City, Oklahoma, Attorneys for Phillips Petroleum Company; James R. Eagleton, Tulsa, Oklahoma, and

James R. Eagleton, Oklahoma City, Oklahoma, Attorneys for Riffe Petroleum Company and Baxter Land Corporation.

OPINION

Before LUTHER BOHANON, United States District Judge

This civil action was originally filed in the District Court of Oklahoma County, Oklahoma, and timely removed to this Court. The plaintiff instituted the action as a citizen and taxpayer under the provisions of §§372 and 373 of Title 62 O.S. 1961, authorizing taxpayers, under certain conditions, to institute suits on behalf of the State. Plaintiff in his Amended Complaint charges that the defendants, and each of them, entered into an unlawful and joint agreement to reduce the amount of a judgment theretofore obtained by the State of Oklahoma against the defendants, except Blankenship, and further that the defendant Blankenship, as the Attorney General for the State of Oklahoma, had no lawful authority to bind the State to such an agreement; that the other defendants knew of such lack of authority; nevertheless, they agreed among themselves to achieve their objective by illegal means in procuring an agreed order to effectuate the alleged unlawful object, and in general seeks a judgment against all of the defendants here for double the amount of the reduction in the prior judgment, or a total of $5,120,411.60. In essence, this constitutes the plaintiff's claim.

This present action is ancillary to another suit in this Court instituted by the then Attorney General on behalf of the State of Oklahoma entitled *State of Oklahoma, ex rel Charles Nesbitt, Attorney General,* v. *Allied Materials Corporation, et al.*, No. 65-344, said action being one brought under the Federal Antitrust Laws for damages and attorneys' fees. In action No. 65-344 the State of Oklahoma, through the Attorney General, prior to trial, reached a

nominal settlement with certain of the named defendants in said action, to-wit: Allied Materials Corporation; Apco Oil Corporation; Monarch Refineries, Incorporated, and Carry-Baxter-Kennedy, Incorporated, for the total sum of $33,050.00, and a proper dismissal was filed as to these parties. After a lengthy trial before a jury, and based upon the jury's verdict, the Honorable Luther B. Eubanks, District Judge, entered a judgment against named defendants in that case for a sum of $1,548,371.31 and trebled the amount of the jury verdict as provided by 15 U.S.C.A. §15 less the sum of $33,050.00 which sum the State of Oklahoma had received as compromise settlements from the parties dismissed as heretofore mentioned, and fixed a reasonable attorneys' fee in the sum of $285,000.00, all as provided by 15 U.S.C.A. §15.

Thereafter each of the defendants except the Attorney General filed motions for new trial for judgment notwithstanding the verdict of the jury, which motions presented intricate, complicated and serious questions of law raising many alleged serious trial errors, the sufficiency of the evidence, errors in admission of evidence and many other alleged errors not necessary to be mentioned here, but which included alleged excessiveness of the verdict, and asked the Court as an alternative to a new trial, to order a remittitur. During the pendency of the defendants' respective motions for new trial and before passing upon said motions, the Trial Judge entered an Order on January 15, 1969,[1] the

---

1 ORDER

"On this 15th day of January, 1969, the above entitled cause was heard upon the several separate motions of the defendants for judgment notwithstanding the verdict or for a new trial.

Upon consideration of the said motions the Court finds that the verdict of the jury and the judgment heretofore entered thereon upon September 24, 1968, are in excessive amount in view of the evidence.

The Court finds that the verdict rendered by the jury in the amount of $1,548,371.31 is excessive by the sum of $704,021.31; that the evidence supports a verdict in the sum of $844,350.00; that the trebled judgment entered on September 24, 1968, upon and pursuant to the

State of Oklahoma, through the Attorney General, G. T. Blankenship, Burck Bailey and Lester M. Klaus, special counsel for the State of Oklahoma and John H. Walters, General Counsel, Department of Highways, State of Oklahoma, approved and filed the ordered remittitur, and on the same date, through the same attorneys for the State of Oklahoma, and upon payment of the judgment as remitted, a satisfaction of this judgment was entered, thus closing the case.

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[1] (Continued)

verdict, after credits for prior settlement received, is excessive by the sum of $2,112,063.93; and that the said verdict and judgment should be remitted in conformity to this finding.

IT IS THEREFORE ORDERED AND ADJUDGED that if the plaintiff, within five days of the date of this order, shall execute and file with the Clerk of the Court a remittitur in the amount of $2,112,063.93, together with all interest accrued to the date of this order, the said judgment heretofore entered on September 24, 1968, is modified, reduced and reentered as of this date in the total amount of $2,500,000.00, together with interest from the date of this order at the rate of ten percent (10%) per annum until paid, and attorneys' fees and costs as hereinafter fixed and allowed.

IT IS FURTHER ORDERED that if such remittitur be filed by the plaintiff, and upon such filing, the several motions of the defendants for judgment notwithstanding the verdict or for a new trial be and the same are overruled as of the date of such filing.

IT IS FURTHER ORDERED that pending the filing of such remittitur, and if the same be not filed within the time provided, jurisdiction to act with respect to the said motions of the defendants is retained for the further action of the Court.

IT IS FURTHER ORDERED that attorneys' fees allowable to plaintiff and its counsel be fixed and assessed against the defendants in the sum of $285,000.00, which the Court finds to be reasonable in amount notwithstanding the remittitur hereinbefore ordered. Upon stipulation of the parties made and entered into in open court, it is ordered that the amount of said attorneys' fees be paid by defendants directly to Burck Bailey and Lester A. Klaus, counsel for plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff have and recover its costs as previously taxed in the amount of $9,800.38.

/s/ Luther B. Eubanks
United States District Judge"

It is this final Order dated January 15, 1969, which the plaintiff in the present case attacks on the grounds: (1) that the judgment entered in Case No. 65-344 on September 24, 1968, was a final judgment, and (2) the Attorney General had no legal authority to agree to the remittitur or the satisfaction of judgment, or otherwise, and (3) the Attorney General and other lawyers representing the State by negotiations with attorneys for defendants looking to a final settlement conspired together to do an unlawful thing; that is, to settle a final judgment in favor of the State for less than the amount thereof.

The parties to the action at bar have each filed separate Motions for Summary Judgment, and each have agreed that no evidence will be offered other than the records of the Court and exhibits in the present case and the records and exhibits of the Court in civil action No. 65-344, together with the statements and admissions made by the parties at pre-trial hearing and the sworn testimony given at such pre-trial hearing.

The first question to be considered is the legal effect or status of the judgment in Case No. 65-344 filed September 24, 1968, that is, was this a final judgment or not, while the defendants' respective Motions for New Trial were pending and then undecided. This Court holds that such judgment was not final, but was subject to change, correction, modification or the granting of a new trial, or other appropriate action.

In *Suggs* v. *Mutual Benefit Health and Accident Association*, 115 F.2d 80 (10 C.A.), a case arising in Oklahoma, the Court said at page 82:

> "A judgment is not generally treated as final until a motion for a new trial or rehearing which has been entertained by the court has been disposed of. In such case the time for appeal runs from the date of such disposition. United States v. Ellicott, 223 U.S. 524, 32 S.Ct. 334, 56 L.Ed. 535. So if a motion or petition for

rehearing is made or presented in season and entertained by the court, the time limit for a writ of error or appeal does not begin to run until the motion is disposed of. (citing cases)

Where the court has power to further view its judgment, it cannot be said that the judgment is final as long as it is being considered by the court. It makes no difference whether the attention of the court is directed to a further consideration of its judgment by a pleading filed as a matter of right, or by a pleading which has no standing in the case as a matter of law, or springs from the court itself."

The Court then quotes from the case of *In Re Boston, etc., Ry. Co.*, Fed Case No. 1,678; 9 Blatchf. 409, 419:

"the court, in substance, stated that where the court retains a matter for further consideration, it will not be final, because decisions lying in the breast of the judge have no such effect."

And in *Methvin* v. *Methvin*, 127 P.2d 186 (Okl. 1942) the Court at page 188 said:

"In the case of Price v. Sanditen, 170 Okl. 75, 38 P.2d 533, 534, we said: 'We do not believe that it was the intention of the lawmakers that the five-year period provided in section 442, supra, 12 O.S. 1941, §735, should begin to run until a judgment becomes final. Section 416 O.S. 1931, 12 O.S. 1941 §681, defines a judgment as folows: "A judgment is the final determination of the rights of the parties in an action."'

We pointed out further that the test of a final judgment is whether or not the Court's jurisdiction has been exhausted as to matters decided and that there could be but one final judgment in any action. It was further pointed out that the fact that an execution may be issued on a judgment does not by any means deter-

mine the finality of such judgment. It is the general rule that a judgment is not final in the sense that it is conclusive upon the parties until the losing party has failed, within the time allowed by law to perfect his appeal, or having properly perfected his appeal, until the highest court whose decision is invoked by either party upholds the decision of the trial court. Annis v. Bell, 10 Okl. 647, 64 P. 11; State v. Schmoll, Mo. App., 37 S.W.2d, and authorities therein cited."

Having determined that the judgment of the Court in Case No. 65-344 was not final because the same still rested in the bosom of the Court upon the motions for new trial and the request for remittitur, did the Attorney General for the State of Oklahoma have authority to file the remittitur as ordered by the Court and to accept in satisfaction the reduced amount?

Title 74 O.S.A. §18 provides:

"The Attorney General shall be the Chief Law Officer of the State."

Section 18(b) provides:

"The duties of the Attorney General as the Chief Law Officer of the State shall be:

(b) to appear for the State and prosecute and defend all actions and proceedings in any of the Federal Courts in which the State is interested as a party."

The plaintiff contends that the Attorney General had no authority to remit any portion of the judgment in Case No. 65-344 in view of Article V, §53 of the Okl. Const., which in material part provides as follows:

"* * * the Legislature shall have no power to release or extinguish, or to authorize the releasing or extin-

guishing, in whole or in part, the indebtedness, liabilities, or obligations of any corporation or individual, to this State, or any county or other municipal corporation thereof."

The Supreme Court of the State of Oklahoma has said:

"In the absence of explicit legislative, or Constitutional expression to the contrary, the Attorney General possesses complete dominion over every litigation in which he properly appears in the interest of the State, whether or not there be a relator or some other nominal party." *Billington, County Clerk* v. *L. L. Weaver, Sheriff*, et al., 440 P.2d 700.

In *Merchants Mutual Bonding Company* v. *State of Oklahoma ex rel Charles Nesbitt, Attorney General*, 438 P.2d 931 (Okl. 1968) at page 934 the Court said:

"We have previously held that there is a rebuttable presumption that any attorney is authorized to appear for the person who he is representing in Court. In re Hess' Estate, Okl., 379 P.2d 851. In the instant case, the defendant offered no evidence to rebut this presumption that the Attorney General had authority to represent the State, nor did defendant offer any evidence requiring the Court to challenge the Attorney General's presumed authority. * * * For these reasons, the defendants second proposition is not well taken."

The power of the Attorney General to compromise suits is discussed in 7 Am.Jur.2d, Attorney General, §15 which states:

"Ordinarily, the Attorney General, both under the Common Law and by Statutes, may control and manage all litigations in behalf of the State and is empowered to make any disposition of the State's litigation, which he deems for its best interest. His power

to effectively control litigation involves the power to discontinue if and when, in his opinion, this should be done.

. . . and the Attorney General may enter into compromises and settlements of suits in which the state is an interested party, which will be binding on the State where there is doubt and an honest dispute as to the State's rights, and the compromise or settlement is a bona fide one, at least when he acts with the approval of the executive head of the department having charge of the matter involved in the suit."

By letter (defendants' Exhibit 2) dated December 20, 1968,[2] and by letter (defendants' Exhibit 1) dated January

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[2] "December 20, 1968

The Honorable G. T. Blankenship
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma

Dear Mr. Blankenship:

We have had occasional conversations in connection with the asphalt cases and the possibility of settling this litigation. I am advised by attorneys that the governor has no legal authority to carry on these negotiations. In addition, I have no desire to participate in them or to influence you in any participation that you or your representative have in these negotiations.

No conversation that we have had or any conversations that you may have had with Tim Dowd or any other staff member should have any bearing on your decision of your negotiations. I consider the disposition of these cases to be within your authority and your sole responsibility.

Sincerely,

/s/ Dewey Bartlett
Dewey F. Bartlett
GOVERNOR

DFB/bf
cc: Mr. Burck Bailey
Attorney at Law
1st National Building
Oklahoma City, Oklahoma"

10, 1969, the Governor of the State of Oklahoma specifically authorized the Attorney General to conduct negotiations for settlement and disposition of this case. Furthermore, the General Counsel for the Department of Highways, State of Oklahoma, Mr. John Paul Walters, approved the remittitur filed and, likewise, signed, executed and approved the satisfaction of judgment. The Department of Highways of the State of Oklahoma was a department principally affected by that suit (65-344) or principally concerned with its outcome.

The plaintiff takes the position that the Court's judgment of September 24, 1968, in Case No. 65-344 was a final judgment, although as noted above motions for new trial and for remittitur were pending and undisposed of, and, therefore, the Attorney General under the Oklahoma Constitution, Article V §53, supra, had no power to release or extinguish— * * * the indebtedness * * * to the State, and consequently the Order directing a remittitur, the filing of the remittitur, and the release and satisfaction of judgment were nullities. Plaintiff concedes that if the judgment was not final and there is a disagreement or doubt concerning the claim, or a good faith dispute as to the claim, then the

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January 10, 1969

The Honorable G. T. Blankenship
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma

Dear General Blankenship:

You have communicated to me your intention to settle the asphalt case for the sum of Two and One-Half Million Dollars. The attorney fee is to be handled as a separate item.

As I stated in my letter to you of December 20, 1968, I consider the disposition of these cases to be within your authority and your sole responsibility.

Sincerely,
Dewey F. Bartlett
GOVERNOR

DFB bf

Attorney General and other interested parties could lawfully agree to a settlement or a compromise of their differences, and this was the posture of plaintiff's claim and the situation existing when the remittitur was filed.

At pre-trial conference held August 11, 1969, in considering the prior judgment and the events leading up to the Order of January 15, 1969, the following sworn statement was made:

"MR. McDERMOTT: All right sir.

The one discussion that I recall at which most of counsel were present took place on the Friday or Thursday preceding the 13th, at Oklahoma City, in Mr. Coleman Hayes' office, is my recollection.

Mr. Hayes was there, Mr. Rucker was there, I was present, and Mr. Eagleton was present; and I am confident that there were others.

Just a moment. Were you there, Mr. Floren?

Mr. Floren was there and possibly others. At that discussion, the attorneys for the State, in the person of Burck Bailey, attended and the meeting was in consultation with Mr. Blankenship from time to time through Bailey, by telephone. It's my recollection that he was not there.

At this point I'd say the discussion had reached levels that it was apparent that a point of accommodation between the parties might well be reached which would result in the disposition of pending questions respecting the previous judgment and the case itself.

And it was at this point that, my recollection is, that I made the suggestion—I may not have; it may have been one of the others—that it was time to go before the Court and advise him of what was toward, and the the situation.

And I believe Mr. Hayes either called the Court or at noon recess went to the courthouse to ask Judge Eubanks for an appointment for the whole group of counsel in the case to appear before him, and returned to say that he did have such an appointment in the afternoon of January 13.

We then, at my suggestion I believe again, to Mr. Bailey, requested that Mr. Blankenship attend that meeting; and we did meet on Monday afternoon with Judge Eubanks in his conference room.

At that meeting counsel for everybody was present, and the State was represented both by Mr. Bailey and Mr. Blankenship himself. I am uncertain whether the attorney for the State Highway Commission was present at that session or not, but I believe that he was. He was invited, certainly.

At that time we reported to the Court that there had been an exchange of viewpoints with respect to pending motions, particularly with respect to the excessive character of the verdict and judgment, and we told him precisely what we had done so far; and that it appeared that there was an area where, if a judgment of remittitur entered the case might be ended to the satisfaction of all concerned.

He told us that he was very happy that this had happened.

At that point I told him there was no agreement to pay or to accept anything, except upon a final and conclusive judgment in the court, and I made the statement that Mr. Brightmire has examined in detail, that it was my opinion and that I had advised Phillips that in no circumstances could we pay anybody anything in this case except in satisfaction of a final judgment.

Others adopted that viewpoint at that time. I cannot repeat precisely who spoke, but I do know that generally the other defendants adopted that position."

And that is the sum of the conference; but Judge Eubanks was advised of everything that had transpired at that time.

* * * * * *

THE COURT: Well, I think here's a, could be a very vital point in this whole affair, and for the benefit of all parties, you, Mr. Brightmire, should accept this statement as his proof, either under oath or not under oath, then I think he should be put under oath either now or at some later time, and to make it such proof as would be appropriate in a court of law.

MR. BRIGHTMIRE: Your Honor, could we do it this way? When you say 'will I accept it?' Certainly I can. I do agree that is his statement as to what occurred without any further proof on the matter. I didn't want to get in the position of stipulating that what he says is true; see what I mean?

THE COURT: I understand that. That wouldn't be for you. The Court or no one would ask you to do that.

But this should be a statement that would have the effect of proof, legal proof, under oath; and if you would stipulate that, all right.

MR. McDERMOTT: Judge, we can cover that very simply.

THE COURT: I think you had better, unless you want to have a full hearing. Do you want to have a hearing?

Well, I don't know of any other, from what has been said here this morning, is there any other testimony that anybody wants to put on? If there is, why we will set it down.

MR. BRIGHTMIRE: I didn't know of any. The parties had discussed this previously. I understood this is the way it is going to be handled. Really we are prob-

ably, I think, maybe making a little too much out of Mr. McDermott's statement. I don't see that it makes too much difference one way or another. I did not want to stipulate that this was true, some of the conclusive matters that he stated. I think that we are all right.

I think that we have understood that we will accept it as proof. That's what the Judge said. That's what you have stated in the record.

MR. McDERMOTT: If there is any difficulty about the form of the proof, I am prepared to make oath to it at this time.

THE COURT: Well, swear Mr. McDermott in. That does bring it to the status of proof.

All right.

LaDANA SMITH (Deputy Court Clerk): You do solemnly swear your testimony will be the whole truth and nothing but the truth, so help you God.

MR. McDERMOTT: I do. And, your Honor, on my oath, my statement which I made to you is correct."

The Court specifically finds, based upon the entire record and specifically the statement made by Mr. McDermott that there was at the time of the entry of the Order of the Court on January 15, 1969, in Case No. 65-344, an honest, good-faith dispute and doubt between the parties as to the amount of money due to the State of Oklahoma, if any, and a good-faith dispute between the parties as to the hazards and doubtfulness of the validity of the claim of the State against the defendants. The Court further finds there was no conspiracy, as alleged. A similar situation was presented to the Supreme Court of Oklahoma in *National Bank of Commerce v. State*, 368 P.2d 997 (Okl. 1962). In this case the County Attorney brought an action against the bank for statutory penalties allegedly attributable to the bank's owning a certain ranch in Washington County

for more than seven years, and following a trial of the case, judgment was entered in favor of the State for a penalty of $2,402.70, together with interest at ten percent (10%) from July 25, 1955, and an attorneys' fee of $600.68. Prior to the filing of this action, a prior action had been filed in the District Court of Tulsa County for the same penalties against the bank. After the bank had answered and the State had filed a reply, the parties reached an agreement to the effect that the State should take judgment for 2/3 of the amount claimed, and this settlement agreement was in effect carried out by a formal judgment of the District Court of Tulsa County, Oklahoma, and the bank contended that the doctrine of res judicata applied and that the State was bound by the settlement agreement, and the Court at page 1002 said:

> "It is settled law in this jurisdiction that where the amount of a claim is in good faith disputed and the interested parties agree upon a compromise, the settlement so made constitutes a bar to any further recovery on the claim. See Jarecki Mfg. Co. v. Cimarron River Oil & Gas Co., 69 Okl. 104, 170 P. 252; L. C. Jones Trucking Company, Inc. v. Jenkins, Okla., 313 P.2d 530, and cited cases.
>
> The law being as stated, it is unnecessary to here determine whether the defense asserted by bank to the Tulsa County case was well founded and it is only necessary to determine whether the defense was asserted in good faith. Our examination of the record satisfies us that the defense was urged in good faith and unless Art. V, Sec. 53 served to prohibit the settlement, same serves as bar to the instant action.
>
> In referring to constitutional provisions of the tenor of the above cited article, it is stated in 81 C.J.S. 'States' Sec. 111, p. 1083 that 'It is not, however, intended to embrace a release of claims doubtful or hazardous which the state might hold against a corpora-

tion or individual, and so claims which are unliquidated and uncertain in amount may be compromised by the state at any time before final judgment.' See also State ex rel. Wilson, Attorney Gen. v. Young, 44 Wyo. 6, 7 P.2d 216, 81 A.L.R. 114 and cited cases.

In defining the word 'unliquidated' it is stated in part, 91 CJ.S. at p. 502 that 'the essence of the term is uncertainty, and it is defined as meaning unascertained as to amount, or undetermined.'

We are convinced that at the time settlement was reached, the claim asserted by the State must be considered as unliquidated and that the matter of whether the State could recover the full amount of the claim was doubtful. We are, therefore, of the opinion that Mr. Williams as the State's representative was not prohibited by Art. V, Sec. 53 from entering into a compromise agreement concerning the claim and that said agreement which was fully executed serves to bar the claim that State asserts in the instant action.

The Court found that extrinsic fraud served to vitiate the judgment in the Tulsa County case, and we assume that this finding was also directed to the settlement upon which the judgment was based. The record, in our opinion, wholly fails to show that the settlement or judgment was tainted by extrinsic fraud. To the contrary, the record shows that those representing the parties, as did the trial judge, fully understood each other's claim and position."

In the case before us now the Court, upon examination of the records before it, finds that the agreement between the parties, later approved by the Court, to settle their differences and which resulted in the order of January 15, 1969, constituted a good-faith claim of the parties to settle an unliquidated, doubtful and hazardous claim, and having been fully executed constitutes a bar to the plaintiff's asserted claims.

The defendants assert by their responsive pleadings that the judgment of January 15, 1969, in Case No. 65-344, constitutes a bar to the present action.

A final judgment rendered in a prior case where the Court had jurisdiction of the subject matter and of the parties, constitutes a bar under the doctrine of res judicata, absent fraud in its procurement, and is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. It is admitted, and the record clearly shows that the Court in Case No. 65-344 had jurisdiction of the parties before it and of the subject matter of the action. The parties in the present case were all parties in Case No. 65-344 with the exception of G. T. Blankenship, Attorney General, in his individual capacity, and the subject matter in the present case is the same as that adjudicated in Case No. 65-344. As to G. T. Blankenship in his individual capacity, he is sufficiently in privity with both the State and the defendants pleading the bar of the final judgment of January 15, 1969, to claim the benefits of that adjudication, and the State itself is barred as to the substance of its claim, regardless of the persons to whom the same is addressed.

The plaintiff here does not plead or assert that there was fraud in the procurement of the final judgment in Case No. 65-344 but pleads only that the same was procured through a civil conspiracy between the defendants in this action. The Court has already held that there was no such conspiracy, and the Court finds, although it perhaps is unnecessary, that there was no fraud of any kind, type or nature in the procurement of the judgment in Case No. 65-344. The fundamental and underlying principles of the doctrine of res judicata are well stated in 46 Am.Jur.2d, p. 558, §394 and §395:

"§394. Statement of doctrine. Literally, res judicata means a matter adjudged; a thing judicially acted upon

or decided; a thing or matter settled by judgment. As stated in many cases, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues whereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

To adopt the language of the English court in announcing the doctrine in an early case, which has been frequently repeated by the courts, the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court. In speaking of this rule and the distinctions which appear therein, it has been said that this brief but comprehensive summary furnishes a rule for every case that any complication of circumstances can produce. On the other hand, it has been declared that when a case lies hard by the line of cleavage between what is and what is not res judicata, it may be a nice question to determine on which side of the line the case falls.

§395. Basis of doctrine. The doctrine of res judicata is a judicially created doctrine, which may be said to exist as an obvious rule of reason, justice, fairness, expediency, practical necessity, and public tranquility. Public policy, judicial orderliness, economy of judicial time, and the interest of litigants, as well as the peace and order of society, all require that stability should be accorded judgments, that controversies once decided on their merits shall remain in repose, that inconsistent judicial decisions shall not be made on the same set of facts, and that there be an end to litigation which, without the doctrine of res judicata, would be endless.

The doctrine of res judicata is but a manifestation of the recognition that endless litigation leads to confusion or chaos. The doctrine reflects the refusal of the law to tolerate a multiplicity of, or needless, litigation and is based on the worthy premise that the interest of the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause. It rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent.

The doctrine of res judicata not only puts an end to strife, but recognizes that certainty in legal relations must be maintained. It produces certainty as to individual rights and gives dignity and respect to judicial proceedings. It is considered that a judgment presents evidence of the facts of so high a nature that nothing which could be proved by evidence aliunde would be sufficient to overcome it, and therefore it would be useless for a party against whom it can be properly applied to adduce any such evidence, and accordingly he is precluded by law from doing so."

For a statement of the doctrine in courts of the United States see *Commissioner of Internal Revenue* v. *Joseph Sunnen*, 333 U.S. 591, 597, 92 L.Ed. 898, and American Law Institute Restatement of the Law of Judgments, §47 and §48; a judgment is no less a bar even though erroneous. Restatement of the Law of Judgments §48, supra. Likewise, a judgment entered by consent, or if erroneous, will be given no less nor greater force or effect than it would have had had it been rendered after protracted litigation, or erroneously decided, 30A Am.Jur. p. 255, §148. *Edward H. Lewis* v. *George C. Wilson, et al.*, 151 U.S. 551, 38 L.Ed. 267; *Cobb* v. *Killingsworth*, (Okl.) 187 P. 477; *State ex rel.*

Jennings v. *Ray County Treasurer, et al.*, (10 C.A.) 87 F.2d 181; *Spencer* v. *Gypsy Oil Company*, 142 F.2d 935 (10 C.A.).

From the foregoing it is quite apparent under the law that plaintiff, State of Oklahoma, is precluded from questioning the judgment of January 15, 1969, in Case No. 65-344, that judgment being final, satisfied and released in full, and the State of Oklahoma has received and still retains the benefit thereof.

The plaintiff contends that the attorneys' fee fixed by the Court in the sum of $285,000.00 in Case No. 65-344 was wrongfully ordered paid directly to the attorneys who represented the State. From what has heretofore been stated, it is probably unnecessary to touch upon this question, however, it will be discussed briefly. The bar of the former judgment heretofore discussed applies equally to the attorneys' fees which constitutes a part of the judgment. The only complaint made by the plaintiff is that the attorneys' fee was ordered paid direct to the attorneys instead of going through the State channels and then to the attorneys. Title 15 §15 states that the injured party in an antitrust suit "shall recover threefold the damages by him sustained and the cost of the suit, including a reasonable attorney fee." It is not clear from this statute whether the attorney's fees must be paid to the injured party or to the attorney. In any event, the statute does not prohibit the payment of the attorney's fees awarded direct to the attorney where the circumstances so justify.

An article in Washington University Law Quarterly 102, entitled "The Nature of 'A Reasonable Attorney's Fee' In Private Anti-trust Litigation," says:

> "The courts have not agreed upon whether the statute requires an award directed to the plaintiff or his attorney. * * * [Other courts] operate under the assumption that the award is to the attorney . . . . This latter view is so strongly held by some courts that it

has been decided that no appeal of the fee would lie because the attorney had indicated to the trial court that he was satisfied, and that the only true test is: 'What, in the opinion of the trial judge, after considering all the factors in the case, would be a reasonable charge for the services of plaintiff's counsel?' "

Assuming, arguendo, that the fee should have been paid to the State as plaintiff and not directly to the attorneys, and thus erroneous, the judgment is nevertheless final on this issue, binding upon the State and is immune from collateral attack in this action. Moreover, the plaintiff, State of Oklahoma, is in no position to complain for it certainly was not entitled to recovery, in addition to its damages, attorneys' fees which it had not expended and which the Court found was reasonable in the circumstances. The State lost no money, and the attorneys received only that which they were entitled to receive. Payment direct to the attorneys, under the facts here, was not in error. The judgment, assuming it may be erroneous, which I do not, is final. American Law Institute Restatement of the Law of Judgments, §48 cases, supra.

Although the plaintiff did not so allege in the Complaint, he does in this Brief by innuendo make the claim that Judge Eubanks, the Trial Judge in Case No. 65-344, was misled by defendants into entering the order or final judgment of January 15, 1969, in that defendant did not make a full disclosure of all the facts leading up to this judgment. This is a serious charge leveled against highly respectable, capable and conscientious counsel who have practiced before this Court for many years and an affront to my brother Judge Eubanks. The record is devoid of the slightest evidence that would reflect on the integrity of counsel, and most certainly Judge Eubanks would not have entered the order in this or any other case without knowing fully the contents of such order and its ultimate consequences. On the contrary the record clearly shows that a

full disclosure of all of the surrounding facts was made to Judge Eubanks, and he was fully aware of the contents of the Order which he signed. The plaintiff made no attempt to prove the contrary. The assertions made by the plaintiff in this regard border on an attempt of plaintiff to mislead this Court. The Court finds that there was no attempt to mislead Judge Eubanks, and in fact he was not misled or misadvised by counsel.

The defendants claim that the plaintiff, J. Woodrow Wilson, is not a proper party relator to bring this action on behalf of the State of Oklahoma. In view of what has been decided above, it is unnecessary to reach this question.

An appropriate judgment will be entered denying the relief sought by plaintiff.

Dated this 31st day of October, 1969.

/s/ Luther Bohanon
United States District Judge.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1971

FILED
United States Court of Appeals
Tenth Circuit
Aug. 24, 1971
HOWARD K. PHILLIPS
Clerk

STATE OF OKLAHOMA, EX REL. J. WOODROW WILSON,
Plaintiff-Appellant

v.

G. T. BLANKENSHIP, Attorney General, State of Oklahoma; SUN OIL COMPANY, (formerly Sunray DX Oil Company), a foreign corporation; KERR-McGEE CORPORATION; PHILLIPS PETROLEUM COMPANY; RIFFE PETROLEUM COMPANY; BAXTER LAND CORPORATION (formerly Inland Asphalt, Inc.),
Defendants-Appellees.

No. 218-70

STATE OF OKLAHOMA, EX REL. J. WOODROW WILSON,
Plaintiff-Appellee,

v.

G. T. BLANKENSHIP, Attorney General, State of Oklahoma; SUN OIL COMPANY (formerly Sunray DX Oil Company), a foreign corporation; KERR-McGEE COR-

No. 219-70

PORATION; PHILLIPS PETROLEUM COMPANY; BAXTER LAND CORPORATION (formerly Inland Asphalt, Inc.),
Defendants,

and

RIFFE PETROLEUM COMPANY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Robert G. Grove (Paul W. Brightmire with him on the brief) for Plaintiff-Appellant.

H. Dale Cook for G. T. Blankenship.

James R. Eagleton for Riffe Petroleum Company.

Truman B. Rucker (J. P. Greve and John A. Ladner, Jr. with him on the brief) for Sun Oil Company.

Coleman Hayes (Michael B. Silva with him on the brief) for Kerr-McGee Corporation.

Richard B. McDermott (S. E. Floren and Edward J. Fauss with him on the brief) for Phillips Petroleum Company.

James R. Eagleton for Baxter Land Corporation (formerly Inland Asphalt, Inc.).

Larry Derryberry, Attorney General of Oklahoma, and Paul C. Duncan, Assistant Attorney General, Amicus Curiae.

Before SETH, McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This case involves a jurisdictional conflict between the state and federal courts in the Western District of Oklahoma. An action was filed in state court and was subsequently removed pursuant to 28 U.S.C. § 1441(b).[1] Following removal the plaintiff filed a motion to remand and this was denied. Thereafter, the several defendants filed a motion for summary judgment on the merits of the case and this motion was granted. The trial court determined that the removed action was ancillary to the prior suit which had been tried and in which judgment entered in the Western District of Oklahoma. On this appeal we are called upon to determine whether the district court had jurisdiction to remove the case from state court and to summarily determine it on its merits.

The Oklahoma state court action which was filed in the District Court of Oklahoma County by a taxpayer had its primary source at least in state statutes, §§ 372 and 373 of Title 62 O.S. 1961. Section 372 provides that government officials who direct the payment of money belonging to the State of Oklahoma in settlement of claims pursuant to an unauthorized contract or agreement are liable for damages resulting therefrom. The latter Section (373) authorizes taxpayers to sue on behalf of the State of Oklahoma seeking damages for losses occasioned by illegal transfers of state money. Double damages are recoverable.

The complaint (filed in the Oklahoma District Court and removed to the United States District Court for the

[1] This section provides:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Western District of Oklahoma) alleged that the former Attorney General, one G. T. Blankenship, lacked authority to settle a certain case which had been brought by the state against Allied Materials Corporation, et al. for an amount less than the verdict and judgment rendered. As noted above, this cause was timely removed to the United States District Court.

The compromise complained about was an agreement by the Attorney General to accept on behalf of Oklahoma the sum of $2,500,000 in settlement of a judgment in the amount of $4,906,864.31, this sum being treble the amount of the jury verdict rendered, which award was $1,548,371.31 plus attorneys' fees and court costs. This treble damage judgment grew out of a federal antitrust case resulting from alleged price fixing conspiracies in connection with the sale of liquid asphalt to the Oklahoma State Highway Department. Under the terms of the compromise settlement the district court entered a remittitur in the amount of $2,112,063.93 and at the same time ordered the payment of $285,000 in attorneys' fees to the private lawyers who had represented the State of Oklahoma.

Double damages were sought under the cited Oklahoma statute for the losses suffered as a result of the alleged unauthorized settlement. The defendant oil companies are brought into it on the theory that they unlawfully conspired with the Attorney General to violate the statute. However, it is clear that the United States District Court for the Western District of Oklahoma approved the proposed settlement. The proposal had been informally presented to the court and on that occasion the judge stated that the verdict of the jury was higher than he would have awarded had he been trying the case. Subsequently, however, a remittitur was ordered on the basis that the verdict was excessive.

The amended complaint herein does not allege that the Attorney General acted fraudulently in entering into the

agreement in question. The sole basis for the claim asserted is that he lacked authority to enter into the agreement. In this present case the district court specifically found that at the time of the settlement there existed an honest, good faith dispute between the parties as to the amount of money due to the State of Oklahoma and also a good faith dispute as to the hazard and doubtfulness of the validity of the claim against the defendants. Hence, it is clear from the record and from the oral arguments as well that there is no issue of fraud and, further, that the conspiracy charge is not made in any onerous sense. The district court did not determine that this present action in and of itself is based on federal law, but rather determined that

1. "This present action is ancillary to another suit in this Court instituted by the then Attorney General on behalf of the State of Oklahoma entitled State of Oklahoma, ex rel. Charles Nesbitt, Attorney General v. Allied Materials Corporation, et al. No. 65-344 * * *."

2. That motions for a new trial and remittitur were pending at the time of the settlement and, hence, the claims of the State of Oklahoma were unliquidated, thus giving the Attorney General the authority to compromise the claims.

3. That the final judgment entered in that case constituted a bar under the doctrine of res judicata.

Appellants contest these conclusions of law on appeal, and further contend that summary judgment was improper as unresolved genuine, material issues of fact remain. The defendants have also raised the issue as to whether the appellant can, under the allegations of the state-court petition, maintain this action by virtue of the Oklahoma statutes relied on.

Since we have concluded that the district court lacked jurisdiction to remove the Oklahoma state action and therefore lacked the authority to decide the case on the merits,

we need not go beyond the jurisdiction question. We are not therefore concerned here with the question considered by the trial court whether the judgment was or was not in a final posture, whereby the Attorney General may or may not have been precluded from settling it.

I.
VALIDITY OF THE REMOVAL

The threshold issue presented is whether the removal of the present action from the District Court of Oklahoma County to the United States District Court for the Western District of Oklahoma was valid and, therefore, whether the motion of the plaintiff to remand was properly denied.

The applicable statute is found in 28 U.S.C. § 1441, which provides as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants * * *.

Part (b) of that section describes the kinds of actions which are removable:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

This is not a diversity of citizenship case, and so in order for the cause to have been removable, it would have had to have been a case within the original jurisdiction of

the U. S. District Court on the basis of a federal question. This in turn is governed by 28 U.S.C. § 1331 which requires that the matter in controversy exceed the sum or value of $10,000 and that it arise under the Constitution, laws or treaties of the United States. Several tests have been suggested for determining whether cases arise under the Constitution, laws or treaties of the United States. See Wright, Law of Federal Courts § 17 Pp. 54-55. Chief Justice Marshall in the very early Supreme Court case of Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379, 5 L.Ed. 257, 285 (1821) said that "A case may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either."

Much later Mr. Justice Holmes formulated an often-quoted and simple test: "A suit arises under the law that creates the action. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). (It was there held that there was no jurisdiction over a suit for damages to business from defendant's statements that plaintiff was infringing defendant's patents).

More recently (in Gully v. First National Bank in Meridian, 299 U.S. 109 (1936)), the Supreme Court per Justice Cardozo stated that to bring a case within the statute (§ 1331) "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." The opinion then goes on to state that:

> The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Id.*; King County v. Seattle School District, 263 U.S. 361, 363, 364, 44 S.Ct. 127, 128, 68 L.Ed. 339. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (New Orleans v. Benjamin, 153 U.S. 411, 424, 14 S.Ct. 905, 38 L.Ed. 764; Defi-

ance Water Co. v. Defiance, 191 U.S. 184, 191, 24 S.Ct. 63, 48 L.Ed. 140; Joy v. St. Louis, 201 U.S. 332, 26 S.Ct. 478, 50 L.Ed. 776; City and County of Denver v. New York Trust Co., 229 U.S. 123, 133, 33 S.Ct. 657, 57 L.Ed. 1101), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (Tennessee v. Union & Planters' Bank, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511; Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126; The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716; Taylor v. Anderson, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218). Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. Devine v. Los Angeles, 202 U.S. 313, 334, 26 S.Ct. 652, 50 L.Ed. 1046; The Fair v. Kohler Die & Specialty Co., *supra*.

Throughout the opinion in *Gully* Justice Cardozo emphasized that the cause does not arise under federal law if the relationship is collateral and indirect rather than basic. In the *Gully* case it was held that the court lacked jurisdiction because it primarily arose under state law and did not become federal because a federal statute consented to the levying of the tax by the state. Thus it is not enough that the suit could not have existed but for the federal statute. The case must be directly concerned with the construction of federal law and a determination of rights thereunder.

This Court has had occasion to apply these principles in Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir., 1963). Speaking through Chief Judge Murrah it was said that a case does not so arise (under the Constitution, laws or treaties of the United States) unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect

of federal law upon the determination of which the result depends. It is further pointed out in the above opinion that

> The fact that a suit involves the construction and effect of a judgment of a Federal court or tribunal does not, for that reason, make it one arising under the Constitution or laws of the United States.

The judgment in that case was rendered by the Indian Claims Commission, and the lawsuit was a dispute as to the construction and effect of the judgment. Inasmuch as the case did not involve directly the statute under which the money was awarded but rather was concerned only with a declaration of rights, it was ruled that federal jurisdiction was not shown.

A corollary requirement (which is noted in *Gully*) is that the complaint must in and of itself disclose the existence of a case arising under the Constitution or laws of the United States. It is not sufficient that the complaint anticipates that a federal question will be raised in the answer, and it is not enough that the petition for removal declares that it is a federal question. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894); Louisville & N.R. Co. v. Mottley, 211 U.S. 149 (1908); Fair v. Kohler Die and Specialty Co., 228 U.S. 22 (1913); and see Gully v. First National Bank in Meridian, *supra*.

In the case at bar removal jurisdiction fails because

First, this action could not have been originally filed in federal court since it does not arise under the Constitution, laws or treaties of the United States. The right asserted arises under the Constitution and laws of Oklahoma.[2] Therefore, it does not satisfy § 1441(a) or (b).

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[2] The lawsuit is predicated on Title 62, §§ 372 and 373 of the Oklahoma statutes (1961). It is also contended that the Attorney General was without authority to agree to the remittitur and the payment of the

Second, it is true that the Oklahoma state case bears a considerable relationship to the prior federal case. As was true in *Gully*, this present action would not have arisen had there not been a federal case and a federal judgment. But as shown by *Gully* this is not a sufficient basis for federal removal jurisdiction.

Third, the present suit does not require a determination of rights under the Federal Constitution or under the federal antitrust laws. It may well be that this present case is ancillary, as the trial court determined, to the antitrust case in federal court, but this is not sufficient either. The present case is concerned with a federal judgment. It questions the validity of diverting $285,000 which had been awarded to the State of Oklahoma to the lawyers who had been appointed to try the case in place of the Attorney General. It also questions the validity of an agreement reducing the judgment from $4,900,000 to $2,500,000. But as was said by this Court in Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, *supra*, the fact that the suit involves the construction and effect of a federal judgment does not make it one arising under the federal law.

It is concluded that an indirect relationship to the federal litigation is not a sufficient basis for removal of the case from state to federal court. We are constrained to rule that the trial court erred in denying the plaintiff's motion to remand the case.

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2. (Continued)

attorney's fee to third parties, due to a prohibition contained in the Constitution of the State of Oklahoma, Art. V, Sec. 53, which provides:

> Except as to tax and assessment charged against real estate * * *, the legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liabilities, or obligations of any corporation or individual, to this State, or any county or other municipal corporation thereof.

II.

INJUNCTION PROCEDURE

Defendants-appellees argue that injunctive relief was available under 28 U.S.C. § 2283.[3] Since the district court could have granted the injunction against state court action, so the argument goes, it follows that the case was properly removed. The fact is that we have before us a removal question. Injunctive relief under § 2283, *supra* was not demanded or considered in the district court. Also, we cannot agree with the suggestion that the removal and injunction remedies may be in some way interchangeable.[4] Removal and injunction are governed by different legal as well as policy standards and considerations.

Authority to enjoin state actions has been recognized throughout our history, and the federal courts exercised the authority somewhat freely despite the fact that the original provisions of the Judiciary Act were limited. It was not until 1941 that the Supreme Court adopted a restrictive rule. This was in Toucey v. New York Life Insurance Company, 314 U.S. 118 (1941), in which it was held that the federal court lacked power to enjoin relitigation of a state court *in personam* claim which had been successfully defended in federal court by the New York Life Insur-

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[3] Which section provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[4] Southern California Petroleum Corporation v. Harper, 273 F.2d 715 (5th Cir. 1960). The opinion of the court (Wisdom, J.) states:

> The policy against federal interference with a state suit previously filed is of long standing and, is a necessary objective in maintaining a balanced federal-state relationship. It is particularly applicable in a case such as the instant case when apparently the complaint filed in the federal court seeks to use the declaratory judgment statute and the equitable remedy of injunction as substitutes for a non-existent right of removal. *Id*, at 720.

ance Company. The Court recognized only one exception, namely the instance in which the federal court had first obtained power over the res in an in rem suit.

In 1948 the present § 2283 was enacted. As noted, this prohibits the enjoining of state court proceedings, except as specifically authorized by Act of Congress, allowing such injunctions where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. This section is generally regarded as having been intended to overcome the *Toucey* doctrine so as to empower federal courts to enjoin relitigation in state court of an *in personam* action.[5] This Court has repeatedly recognized that a federal court is empowered to enjoin relitigation in the interest of effectuating its judgment.[6]

However, it is also clear that when two allegedly conflicting lawsuits, one in state and one in federal court, present essentially different issues and different causes of action, an injunction will not lie to stay the state court proceedings. Southern California Petroleum Corp. v. Harper, 273 F.2d 715 (5th Cir. 1960). *See also* Pacific Livestock Co. v. Lewis, 217 F. 95, 97 (D. Ore. 1914); Nelson v. Camp, 191 F. 712 (5th Cir. 1911). The policy against federal interference with a state suit previously filed is of long standing and particularly applicable in a case where the equitable remedy of injunction is sought to be used as a substitute

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[5] Jackson v. Carter Oil Co., 179 F.2d 524 (10th Cir.), *cert. denied*, 340 U.S. 812 (1950).

[6] The proposition that federal courts have power to enjoin the prosecution of a state court action to effectuate its judgment is well established. Williams v. Pacific Royalty Company, 247 F.2d 672, 675 (10th Cir. 1957); Berman v. Denver Tramway Corp., 197 F.2d 946 (10th Cir. 1952); Jackson v. Carter Oil Co., 179 F.2d 542 (10th Cir.), *cert. denied*, 340 U.S. 812 (1950). Accordingly, "the court has jurisdiction through means of a supplemental proceeding to enjoin the relitigation in a state court of a matter litigated, determined, and adjudicated by its valid decree regularly entered, if the result of the relitigation would be to destroy the effect of the decree rendered in the United States Court." Berman v. Denver Tramway Corp., *supra* at 950.

for a non-existent right of removal. Southern California Petroleum Corp. v. Harper, *supra* at 720.

Had the Oklahoma state court action been concerned with the issues which had been tried in the federal anti-trust case, it would be clear that an effort was being made to relitigate, and injunction to protect the federal court judgment would in all probability have been proper. It is impossible, however, to construe as attempted relitigation an action which arises under state law, and which is concerned with new factual as well as legal issues—e.g. extent of authority of the Attorney General, possible violation of duty by him, finality or interlocutory posture of the stipulated judgment, etc. True, the state action has its source in the stipulation and remittitur, but this indirect relationship falls short of rendering the subsequent action identical in law and fact with the former action. At most or at best it is supplemental to it, and since it is a distinct cause of action based on different evidence, it is not barred by the doctrine of *res judicata*.[7]

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[7] [T]he doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

46 Am.Jur.2d, p. 558, § 394. However, it is also true that when a subsequent lawsuit involves an essentially different cause of action, based on different facts and circumstances, the former judgment does not preclude maintenance of the subsequent lawsuit under the doctrine of res judicata, and in such a case a prior judgment operates as an "estoppel" only with respect to matters *actually* litigated and determined. Security Ins. Co. of New Haven v. Johnson, 276 F.2d 182, 187 (10th Cir. 1960); Happy Elevator No. 2 v. Osage Const. Co., 209 F.2d 459, 461 (10th Cir. 1954) (and cases cited therein). And it has also been held that "(w)here a court incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter directly." Tidewater Oil Co. v. Jackson, 320 F.2d 157, 162 (10th Cir. 1963) (quoting from Restatement of the Law of Judgments, § 71).

[APPENDIX]

As we view the record before us, the authority or lack of authority of the Attorney General did not come into focus when the settlement judgment was designed and entered. There is some indication from the fact that the remittitur technique was deemed necessary by the lawyers that there may have been some apprehension among them on this question, but the fact remains that the issue was not adjudicated either expressly or impliedly and so we have to conclude that the question remains open.

Finally, there is no need to emphasize that we have not expressed an opinion on the merits of this state lawsuit. Our holding is limited to the jurisdiction questions, and having determined that the trial court lacked jurisdiction, the cause must be reversed with directions to remand the case to the Oklahoma district court.

In view of the above determination, the order with respect to Riffe Oil Company is also reversed subject to its motion of being interposed in state court.

APPENDIX "C"

SEPTEMBER TERM—OCTOBER 7, 1971

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable William E. Doyle, Circuit Judges.

STATE OF OKLAHOMA, ex rel J. Woodrow Wilson,

Plaintiff-Appellant,

v.

No. 218-70

G. T. BLANKENSHIP, Attorney General, State of Oklahoma, SUN OIL COMPANY, (formerly Sun Ray DX Oil Company), a foreign corporation, KERR-McGEE CORPORATION, PHILLIPS PETROLEUM COMPANY, RIFFE PETROLEUM COMPANY, BAXTER LAND CORPORATION (Formerly Inland Asphalt, Inc.),

Defendants-Appellees.

Upon consideration of petition of defendants-appellees for rehearing, it is ordered that said petition be and is hereby denied.

[APPENDIX]

SEPTEMBER TERM—OCTOBER 7, 1971

Before Honorable David T. Lewis, Chief Judge; and Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges.

STATE OF OKLAHOMA, ex rel J. Woodrow Wilson,

Plaintiff-Appellant,

v. No. 218-70

G. T. BLANKENSHIP, Attorney General, State of Oklahoma, SUN OIL COMPANY, (formerly Sunray DX Oil Company), a foreign corporation, KERR-McGEE CORPORATION, PHILLIPS PETROLEUM COMPANY, RIFFE PETROLEUM COMPANY, BAXTER LAND CORPORATION (Formerly Inland Asphalt, Inc.),

Defendants-Appellees.

Upon consideration of petition of defendants-appellees for rehearing containing a suggestion for rehearing en banc, it is ordered that said suggestion for rehearing en banc be and is denied; Judge William J. Holloway, not participating in the en banc decision.

JULY TERM—AUGUST 24, 1971

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable William E. Doyle, Circuit Judges.

STATE OF OKLAHOMA, ex rel J. WOODROW WILSON,
Plaintiff-Appellant,
v.
No. 218-70
G. T. BLANKENSHIP, Attorney General, State of Oklahoma, SUN OIL COMPANY, (formerly Sun Ray DX Oil Company), a foreign corporation, KERR-McGEE CORPORATION, PHILLIPS PETROLEUM COMPANY, RIFFE PETROLEUM COMPANY, BAXTER LAND CORPORATION (Formerly Inland Asphalt, Inc.),
Defendants-Appellees.

STATE OF OKLAHOMA, ex rel J. WOODROW WILSON,
Plaintiff-Appellee,
v.
No. 219-70
G. T. BLANKENSHIP, Attorney General, State of Oklahoma, SUN OIL COMPANY, (formerly Sunray DX Oil Company), a foreign corporation, KERR-McGEE CORPORATION; PHILLIPS PETROLEUM COMPANY; BAXTER LAND CORPORATION (formerly Inland Asphalt, Inc.),
Defendants
and
RIFFE PETROLEUM COMPANY,
Defendant-Appellant.

[APPENDIX]

These consolidated causes came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and were argued by counsel.

On consideration whereof, it is ordered that the judgment of said court (in No. 218-70) is reversed with directions to remand the case to the Oklahoma district court.

It is further ordered that the judgment of said court with respect to Riffe Oil Company is reversed subject to its motion of being interposed in state court.

HOWARD K. PHILLIPS, Clerk.

By s/ Helen R. Bartha
Deputy Clerk

APPENDIX "D"

STATUTORY PROVISIONS

TITLE 28 U.S.C: SECTION 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly

joined and served as defendants is a citizen of the State in which such action is brought.

TITLE 28 U.S.C. SECTION 1355. Fine, penalty or forfeiture

The district courts shall have original jurisdiction, exclusive of the courts of the States; of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

TITLE 28 U.S.C. SECTION 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

OKLAHOMA STATUTES 1961, VOL. 2, TITLE 62

Section 372. Fraudulent claims—Liability of public officers. Every officer of the State and of any county, township, city, town, or school district, who shall hereafter order or direct the payment of any money or transfer of any property belonging to the State or to such county, township, city, town, or school district, in settlement of any claim known to such officers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made or attempted to be made, for the State or any such county, township, city, town, or school district, by any officer thereof, and every person, having notice of the facts, with whom such unauthorized, unlawful or fraudulent contract shall have been made, or to whom, or for whose benefit such money shall be paid or such transfer of property shall be made, shall be jointly and severally liable in damage to all innocent persons in any manner injured thereby, and shall be furthermore jointly and severally liable to the State, county, township,

city, town, or school districts affected, for double the amount of all such sums of money so paid, and double the value of property so transferred, as a penalty, to be recovered at the suit of the proper officers of the State or such county, township, city, town, or school district, or of any resident taxpayer thereof, as hereinafter provided.

Section 373. Taxpayer may institute suit on failure of officers.

Upon the refusal, failure, or neglect of the proper officers of the State or of any county, township, city, town, or school district, after written demand made upon them by ten resident taxpayers of the State or such county, township, city, town, or school district, to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to the State, or such county, township, city, town, or school district, paid out or transferred by any officer thereof in pursuance of any unauthorized, unlawful, fraudulent, or void contract made, or attempted to be made, by any of its officers for the State or any such county, township, city, town, or school district, or for the penalty provided in the preceding section, any resident taxpayer of the State or such county, township, city, town, or school district affected by such payment or transfer after serving the notice aforesaid and after giving security for cost, may in the name of the State of Oklahoma as plaintiff, institute and maintain any proper action which the proper officers of the State, county ,township, city, town, or school district might institute and maintain for the recovery of such property, or for said penalty; and such municipality shall in such event be made defendant, and one-half the amount of money and one-half the value of the property recovered in any action maintained at the expense of a resident taxpayer under this section, shall be paid to such resident taxpayer as a reward.

Supreme Court, U.S.
FILED
DEC 21 1971
E. ROBERT SEAVER, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-686

G. T. BLANKENSHIP, Attorney General, State of Oklahoma; SUN OIL COMPANY (formerly SUNRAY DX OIL COMPANY), a foreign corporation; KERR-McGEE CORPORATION; PHILLIPS PETROLEUM COMPANY; BAXTER LAND CORPORATION (formerly INLAND ASPHALT, INC.),
Petitioners,

VERSUS

STATE OF OKLAHOMA, EX REL. J. WOODROW WILSON,
Respondent.

BRIEF IN OPPOSITION

ROBERT G. GROVE
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Oklahoma City, Oklahoma 73102
Counsel for Respondent

December, 1971

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0036

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In the
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-686

G. T. BLANKENSHIP, Attorney General, State of Oklahoma; SUN OIL COMPANY (formerly SUNRAY DX OIL COMPANY), a foreign corporation; KERR-McGEE CORPORATION; PHILLIPS PETROLEUM COMPANY; BAXTER LAND CORPORATION (formerly INLAND ASPHALT, INC.),

Petitioners,

VERSUS

STATE OF OKLAHOMA, EX REL. J. WOODROW WILSON,

Respondent.

BRIEF IN OPPOSITION

I

IMPORTANCE OF THE QUESTION

The opinion and judgment of the Tenth Circuit affects only the litigants herein; it is consistent with opinions of this Court and affords the citizens of Oklahoma an opportunity to seek recourse. The judgment is based upon rules of long-standing promulgated by this Court, and pursuant to the admonition of Mr. Justice Cordozo in *Gully* v. *First National Bank in Meridian*, 299 U.S. 109, 58 S.Ct. 96, 81 L.Ed. 70, that there must be a common-sense adjustment of the law to changing factual situations.

Petitioners' recitation concerning the importance of the question, when applied to proper factual situations, cannot be argued with. However, Petitioners are taking the position that for Respondent to ever prevail, it must first have the state court set aside the federal judgment. This of course is an erroneous assumption. It is without question that the federal judgment gave life to Respondent's claim. The federal judgment created a property right belonging to the State of Oklahoma; a part of that property was disposed of through the conjoint and conspiratorial acts of Petitioners, contrary to *Article V, Section 53 of the Oklahoma Constitution*.[1] Respondent in its state court petition sought only to recover the remainder of that property created by the federal judgment of September 24, 1968, in a state court, pursuant to state law. Respondent's cause of action is based upon the property right it acquired by virtue of said judgment and the acts of Petitioners subsequent thereto, which ultimately resulted in the agreed remittitur, and which Petitioners thereafter sought to clothe with the sacrosanctity of the federal judgment of January 15, 1969.

The judgment of the federal court of January 15, 1969, insofar as Respondent's case is concerned, is of no consequence. Irrespective of Respondent's prayer in its amended complaint (which constitutes no part of the pleading) the state court could not in any way change the federal court judgment, nor would it need to in order to afford Respondent its remedy. Petitioners are merely attempting to cre-

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[1] "Except as to tax and assessment charged against real estate * * *, the legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liabilities or obligations of any corporation or individual, to this State, or any county or other municipal corporation thereof."

ate an "important question" for the purpose of their Petition, from the bits and tatters of possibly inadvertent but not fatally defective verbiage.

This Court as early as 1888, in *Metcalf* v. *City of Watertown*, 128 U.S. 543, 9 S.Ct. 73, 32 L.Ed. 543, came to grips with the problems of the nature of a federal judgment insofar as it affects jurisdiction of state and federal courts. Therein plaintiff had sued defendant in the federal trial court in the State of Wisconsin on a federal judgment that had been previously awarded his assignor. Judgment was had by defendant in the trial court and review was sought in this Court. In this Court, lack of jurisdiction had not been urged as error. Mr. Justice Harland delivered the opinion of the Court and in reversing for lack of jurisdiction stated:

> "* * * Nor can the jurisdiction of the Circuit Court be maintained upon the theory that the suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States, does not, of itself, make it a suit of that character; for the Plaintiff without raising by his complaint any distinct question of a federal nature, and without indicating, by proper averment, how the determination of any question of that character is involved in this case, seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the City of Watertown * * *."

So in *Metcalf*, where suit was instituted on the basis of a judgment of a federal court, in a federal court, this Court reversed on the grounds that the federal court did not have jurisdiction. *Metcalf* was cited by Judge Murrah

in *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F.2d 767 (C.A. 10, 1963), as authority for his holding in that case, that a suit which involves the construction or effect on a federal judgment, in and of itself, did not constitute a federal question. Of course, the case at bar and *Metcalf* are readily distinguishable if you take the view, as Petitioners do, that Respondent must set aside the federal judgment in its state court suit before it can prevail. However, if it is viewed from the standpoint (as Mr. Justice Harland did in *Metcalf*) that the federal judgment is nothing more than a property right, then Respondent's attempt in state court to recover its property created by the federal judgment is not inconsistent with *Metcalf*. Petitioners' assertion that the question herein presented for review is unique to this Court is baseless.

II

CONFLICTS AMONG THE COURTS

Petitioners have cited *South Dakota Central Ry. Co.* v. *Continental and Commercial Trust and Savings Bank, et al.*, 255 Fed. 941 (C.A. 8), as being in conflict with the ruling of the Tenth Circuit Court in the instant action. The two cases are readily distinguishable. In *South Dakota* appellant had made a direct attack upon the federal judgment in a state court; it could only prevail if the federal judgment was set aside. In the instant case it is not necessary that the federal judgment of January 15, 1969, be disturbed at all; Respondent is only seeking to recover that property right created by the federal judgment of September 24, 1968, under a state statute which gives it the right. The instant case is more comparable to *Carson* v. *Dunaham*,

121 U.S. 421, 7 S.Ct. 1030, 30 L.Ed. 992, which was cited as authority by appellant in *South Dakota* and distinguished therein by the court. The Eighth Circuit, in *South Dakota*, quoted from *Carson* as follows:

> "It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the court of the United States, without presenting any question distinctly involving the laws of the United States."

Petitioners have also cited *Deauville Associates* v. *Lojoy Corporation*, 181 F.2d 5 (C.A. 5, 1950), as being in conflict with the Tenth Circuit ruling in the instant case. *Deauville* is distinguishable on the same basis as is *South Dakota* inasmuch as therein appellants were also making a direct attack in a state court upon a federal judgment and could only be afforded a remedy if the federal judgment was set aside.

III

THE OPERATION AND EFFECT ON SECTION 1355

Petitioners are concerned that Respondent in its state court action is seeking to recover a penalty from Petitioners when the exclusive jurisdiction to do so is vested in the federal court. Respondent states again, as it has previously, that its cause of action is footed upon the federal judgment, which is composed of actual damages and the penalty imposed by the court under the anti-trust provision of the Acts of Congress. However, once the judgment of September 24, 1968, had been entered by the court, it then became a property right belonging to the State of Oklahoma, and the source of the property loses significance insofar as the jurisdictional issue is concerned.

Petitioners reason that original jurisdiction would lie in federal court on the basis that a portion of the property Respondent seeks to recover had its source in the penalty provisions of the Acts of Congress; if this be a proper premise, then it should logically follow that that portion of property would never lose its identity and forever be subject to federal jurisdiction; Respondent respectfully suggests that such reasoning is fallacious.

IV

THE DEPARTURE OF THE COURT FROM ACCEPTED PROCEDURE

Petitioners have asked this Court to exercise its supervisory powers to correct what they say is harmful error made by the Tenth Circuit in its opinion. The portion of the Circuit Opinion complained of appears in the appendix of the Petition for a Writ of Certiorari at pages xxxiii through xxxvi. This part of the opinion is directed to Petitioners' contention in their brief to the Circuit supporting their theory that the federal court had jurisdiction of the cause. They therein took the position that had they chosen they could have had injunctive relief from the federal court to prohibit the state court from proceeding in the cause; suggesting to the Circuit that for this reason jurisdiction of the trial court should be sustained. It appears that Petitioners have been answered by the Circuit in a way not to their liking and now want relief from an opinion which met their argument head-on.

In discussing the question of injunctive relief the court necessarily had to review the arguments made by Petitioners and Respondent in their respective Circuit Court

briefs with regard to whether or not the state action was the same as the federal action. Petitioners, in their brief to the Circuit devoted 24 pages to that argument, concluding the cases were identical and *res judicata* or collateral estoppel was a bar. The Circuit opinion in concluding that the federal court was without jurisdiction, was upon the issues framed by the pleadings and which were briefed extensively and argued. Petitioners should not now be heard to complain that a matter determined by the Circuit, in resolving the jurisdictional issue, is a departure from "Accepted Procedure."

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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